

September 24, 2014

Leslie E. Devaney
City Attorney
2488 Historic Decatur Road Suite 200
San Diego, California 92106

Re: Your Request for Advice
Our File No. A-14-142

Dear Ms. Devaney:

This letter responds to your request for advice on behalf of Del Mar Councilmember Don Mosier and the Del Mar City Council regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Government Code Section 1090.

We do not provide advice on other conflict of interest restrictions that could arise such as those governed by the common law. Please note that the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), and this letter is based on the facts presented. In addition, the Commission does not provide advice on past conduct.

Pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the San Diego County District Attorney’s Office concerning potential issues raised under Section 1090 and we did not receive a written response from either entity. Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

QUESTION

1. May the City Council approve a claim for property damage caused by the City’s sewer system filed by Councilmember Mosier, so long as the Councilmember abstains from participating in the decision in his official capacity?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. May the City Council approve a similar claim with the Councilmember's tenant, so long as the Councilmember abstains from participating in the decision in any capacity?

CONCLUSION

1-2. Yes. Neither the Act nor Government Code Section 1090 prevents the City Council from approving a claim for property damage caused by the City's sewer system, but under both laws, Councilmember Mosier has a disqualifying conflict of interest preventing him from participating in the decisions.

FACTS

A sewer back up on May 25, 2014 in the City of Del Mar affected residential property wholly owned by Councilmember Mosier. Mr. Mosier owns a cottage on the property and has a tenant who lives and conducts his business from the cottage. Both the tenant and Mr. Mosier have filed claims with the City of Del Mar. Mr. Mosier claims property damage; the tenant claims both displacement and property damage. The City is treating these as separate claims.

City staff analyzed the Councilmember's claim and concluded that \$18,182.21 is an appropriate amount of reimbursement for repair costs to his property. However, under the City's municipal code, the City Manager may only approve settlements of \$2,500 or less. The reimbursement for Councilmember Mosier's claim and associated settlement and release of claims must be approved by the City Council.

In addition, staff is still negotiating with the tenant regarding reimbursement of his claimed damages. It appears the amount will also exceed the City Manager's authority requiring eventual Council consideration of a settlement with the tenant.

In our telephone conversation of September 9, 2014, Deputy City Attorney Chris Cameron from your office stated that because Mr. Mosier understands he has a conflict of interest in the reimbursement decisions before the City Council, he will not be making or participating in those decisions in his official capacity.

ANALYSIS

Conflict of Interest Under the Act:

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission uses a standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

You state that Mr. Mosier has a conflict of interest because his real property and tenant are the subjects of governmental decisions before the City Council, and he will not be

participating in those decisions in his official capacity. Thus, we do not analyze all the steps of the standard analysis. Rather we focus on whether the councilmember, by submitting a claim for damages and reimbursement and by representing his interests, could be “influencing” a decision before his agency, the City Council.

Influencing:

An official “attempts to use his or her official position to influence a decision” if “the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency.” (Regulation 18702.3.)

Two situations are considered using one’s official position to influence a governmental decision. The first is when a governmental decision is within or before the official’s own agency or an agency appointed by or subject to the budgetary control of the official’s agency. Regulation 18702.3(a) states that an official “is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.”

The second situation is when the governmental decision is before an agency that is not the official’s own agency or appointed by or subject to his or her own agency’s budgetary control. Under this situation, Regulation 18702.3(b) states that an “official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency.”

Exceptions

Regulation 18702.4(a)(1) provides that making or participating in making a governmental decision shall not include:

“Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official’s personal interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1);”

Moreover, Regulation 18702.4(b)(3) provides:

“(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

“(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official’s “personal interests” include, but are not limited to:

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

“(B) A business entity wholly owned by the official or members of his or her immediate family.

“(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.” (Emphasis added.)

We have advised that this exception is very narrow and is not intended to apply to every decision in which an official has a conflict of interest, but only those decisions where the official’s personal economic interests will be affected and no one else but the official can represent his or her concerns relative to those interests. The exception would not permit an official to represent anyone else’s interest. We have cautioned that comments should be strictly limited to the official’s personal interests. In addition, the official should make clear that he or she is not speaking in the interest of any other person or group, and that he or she is not acting in an official capacity. (See *Simonian* Advice Letter, No. A-09-174 and *Adams* Advice Letter, No. I-06-129.)

Under your facts, Mr. Mosier has a conflict of interest in the decision before the City Council and may not participate in his capacity as a City Councilmember in the decision to approve his reimbursement claim, nor that of his tenant. However, consistent with the discussion above, the exception would allow him to appear before the City Council as any other member of the public and represent himself on matters related solely his claim. However, he may not appear before the City in any capacity in connection with his tenant’s claim.

Government Code Section 1090:

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended not only to strike at actual impropriety, but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103Cal.App.3d 191, 197.)

Under Section 1090, the prohibited act is the making of a contract in which the official has a financial interest. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that

violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We employ the following six-step analysis to determine whether Councilmember Mosier has a conflict of interest under Section 1090.

Step One: Is Councilmember Mosier subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” City Councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) Therefore, Mr. Mosier and the Del Mar City Council are subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

Here, the decision at issue necessarily involves a contract. In order for the councilmember to be reimbursed for damages to his real property caused by the City sewer line, Mr. Mosier must enter into a settlement of his claim for damages and release of claims with the City of Del Mar. Both these agreements are “contracts” under Section 1090.

Step Three: Is Councilmember Mosier making or participating in making a contract?

Councilmember Mosier understands he has a conflict of interest and will not be participating in the decision involving the reimbursement claims for his real property and that of his tenant. However, as a City Councilmember, his participation in the matter before the City Council is presumed under Section 1090, regardless of whether he actually participates in the decision.² Moreover, the agreement between Councilmember Mosier and the City of Del Mar under which funds are distributed to reimburse him and/or his tenant for damage caused by a

² When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).)

City sewer line, is a contract. The Del Mar City Council's decision to approve any reimbursement agreement for damages that exceeds \$2,500 involves the making or participation in the making of a contract.

Step Four: Does Councilmember Mosier have a financial interest in the contract?

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

In addition, an official may have a remote financial interest in a contracting party even though he or she will not derive a personal benefit. For instance, a public official who is a landlord or tenant of a contracting party has a remote interest in the contracts of that party. (Section 1091(b)(5); see also 89 Ops.Cal.Atty.Gen. 193 (2006).)

In the current situation, the councilmember would have a financial interest in the reimbursement contract based on his entitlement to receive reimbursement for damages caused by a City sewer line to his property. He would also have a remote financial interest in the contract to reimburse his tenant for property and other damages because he is the landlord of the contracting party.

Step Five: Does either a remote interest or non-interest exception apply?

When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5.

If a "remote interest" is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a "noninterest" is present, the contract may be made

without the officer's abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

Under the circumstances presented, we discuss the "remote interest" specified in Section 1091(b)(5) and the "noninterest" specified in Section 1091.5(a)(3).³

Landlord or Tenant:

The "remote interest" exception for a landlord of a contracting party set forth in Section 1091(b)(5) includes "[t]hat of a landlord or tenant of the contracting party."

Accordingly, the City Council may approve reimbursement of and settlement with the Councilmember's tenant for his property and displacement claims, as long as the Councilmember discloses his remote financial interest, the interest is noted in the City Council's official records, and the councilmember does not participate in the making of the agreement. (89 Ops. Cal. Atty. Gen. 193.)

Non-Interest - Public Services Generally Provided:

The "noninterest" specified in Section 1091.5 (a)(3) provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest is "[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board."

The phrase "on the same terms and conditions" requires there be no special treatment of an official, either express or implied, because of that person's status as an official. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1101.) Accordingly, the public services exception generally will *not* apply when provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official's particular circumstances.⁴

In the situation at hand, the decision before the City Council with regard to reimbursement of damages to Mr. Mosier's property involves the exercise of judgment and discretion regarding that particular claim. Because the decision involves "consideration of conditions unique to each proposal and subject to the particularized judgment and discretion of the district or its board," the public services exception does not apply. (See 92 Ops.Cal.Atty.Gen. at 72.)

³ Section 1091.5(b)(15) sets forth a remote interest exception for settlement of litigation. However, your facts do not indicate that the Councilmember is presently in litigation with the City concerning his claim.

⁴ *Lexin, supra* at 1088, 1100; 1100 at note 28; 88 Ops.Cal.Atty.Gen. at 128 ("discretionary or highly customized services" benefitting official would not come within "public services" exception), 92 Ops.Cal.Atty.Gen. at 71.

Step Six: Does the rule of necessity apply?

In limited cases, the “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.) The rule has been applied where public policy concerns authorize the contract and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Ibid.*; See also 69 Ops.Cal.Atty.Gen. 102, 109 (1986); (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) “The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so . . .” (*Lexin, supra*, at p. 1097.)

Under this rule, a contract can be executed even though it would otherwise violate the terms of Section 1090. The “rule of necessity” has been applied in at least two specific types of situations: where the contract is for essential services and no source other than the one that triggers the conflict is available; and where the official or board is the only one authorized to act.⁵

For instance, the “rule of necessity” has been applied to allow a school board to enter into a memorandum of understanding with a teachers’ association even when a board member is married to a tenured teacher and would have a financial interest in the contract. (69 Ops.Cal.Atty.Gen. 102 (1986).) Similarly, a community college board was allowed under the rule to negotiate with its faculty for salary and benefits even though a board member was a retired faculty member whose health benefits were tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).) In addition, a city councilmember who had an interest in a local cable franchise was allowed to use the rule of necessity to dispose of his interest where the city council was required to approve such disposition. (76 Ops.Cal.Atty.Gen. 118, 123-125 (1993).) And finally, in *Caminetti v. Pac. Mutual Life Insurance Co.* (1943) 22 Cal.2d 344, 366, the California Supreme Court held that the Insurance Commissioner may make contracts involving a delinquent insurer in which he holds a policy, despite the prohibitions in the predecessor statute to Section 1090 (former Section 920), since “[n]o other officer is authorized to perform the commissioner's duties . . .”

Your facts state that the City’s municipal code allows the City Manager to approve claims and settlements of \$2,500 or less, but only the City Council has the authority to approve, and only it may act upon, claims and settlements for larger amounts. The settlement of claims deemed in their best interest is an essential and necessary function of any city. In requiring City Council action to approve the settlement claims over \$2,500, the City of Del Mar recognizes the importance of protecting the public fisc.

Were the City prohibited from taking action on the Councilmember’s claim, there is no other body or person authorized to act. If such were the case, the Councilmember would be

⁵ 69 Ops.Cal.Atty.Gen. 102, 109 (1986).

forced to file formal litigation against the City to seek satisfaction of his claim, resulting in both the official and the City incurring significant fees and costs they would both prefer to avoid, as pre-litigation settlement would not be an option. Forcing parties to litigate claims they could settle out-of-court serves no recognizable public policy, and we believe that such an absurd result was never intended by the Legislature. Instead, in such circumstances, “we apply reason and practicality, and interpret the statute in accord with common sense and justice, and to avoid an absurd result. [Citations.]” (*Kono v. Meeker* (2011) 196 Cal.App.4th 81, 87–88.) Indeed, as one court has recognized, “There is an equally strong public policy . . . to encourage the settlement of controversies in preference to litigation. Our Supreme Court ‘recognized a century ago that settlement agreements are highly favored as productive of peace and good will in the community,’ as well as ‘reducing the expense and persistency of litigation.’ [Citation.] The need for settlements is greater than ever before. ‘Without them our system of civil adjudication would quickly break down.’ ” (*Salmon Protection and Watershed Network v. County of Marin* (2012) 205 Cal. App. 4th 195, 201, citations omitted.) Therefore, we find that the rule of necessity applies in this case in that it would allow the City Council to carry out its essential duties of settling and reimbursing claims for damages of \$2,500 or more for which the City is responsible, without the unnecessary need for litigation.

Therefore, the City Council may act on Councilmember Mosier’s claim for property damage caused by the City’s sewer system, but as discussed above, the Councilmember must disqualify himself from participating in this decision in his official capacity.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl